

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2129.

716

CHARLES W. KING, APPELLANT,

vs.

**CUNO H. RUDOLPH, JOHN H. JOHNSTON, AND WILLIAM
V. JUDSON, COMMISSIONERS OF THE DISTRICT OF
COLUMBIA.**

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 28, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

No. 2129.

CHARLES W. KING, APPELLANT,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND
JAY J. MORROW, COMMISSIONERS OF THE DISTRICT
OF COLUMBIA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2129.

CHARLES W. KING, Appellant,
vs.
CUNO H. RUDOLPH et al., &c.

a Supreme Court of the District of Columbia.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING — ON THE SOUTH SIDE
OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, IN THE
DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of
Columbia, at the City of Washington, in said District, at the times
hereinafter mentioned, the following papers were filed and proceed-
ings had in the above entitled cause, to wit:

1 *Petition for Condemnation.*

Filed Nov. 25, 1908.

In the Supreme Court of the District of Columbia.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING — ON THE SOUTH SIDE
OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, IN THE
DISTRICT OF COLUMBIA.

Henry B. F. Macfarland, Henry L. West and Jay J. Morrow, peti-
tioners herein, respectfully show to the Court as follows:

1. That they are the Commissioners of the District of Columbia,
and as such Commissioners file this petition for the purpose of the
establishment of a uniform building line on the south side of Park
Road from School street to 16th street, northwest, in the District of
Columbia under the authority of an Act of Congress approved June

21st, 1906, entitled "An act providing for the establishment of a uniform building line on streets in the District of Columbia less than ninety feet wide."

2. The aforesaid Act provides that the Commissioners of the District of Columbia are authorized to establish building lines on streets or parts of streets less than ninety feet wide, in the District of Columbia, upon the presentation to them of a plat of the street or part of street upon which such action is desired, showing the lots and the names of the record owners thereof and accompanied by a petition of the owners of more than one half of the real estate shown on said plat requesting that building lines be established, or when the Commissioners deem that the public interests require that such building lines be established provided that no such building lines be established on any part of street less than one block in length.

3. Section two of the said Act of Congress further provides that upon the filing of such plat and petition in the office of the said Commissioners, or when the Commissioners shall deem that the public interests require it, the said Commissioners shall institute condemnation proceedings in the Supreme Court of the District of Columbia, sitting as a District Court, by a petition *in rem* particularly describing the land to be taken, which petition shall be accompanied by duplicate plats to be prepared by the Surveyor of the said District, showing the location of the said proposed building lines, the number of square feet to be taken from each lot or part of lot and the boundaries thereof in each square or block thereof, and such further information as may be necessary for the purpose of said condemnation.

4. Section three of said Act provides that the condemnation proceeding herein provided for shall be in accordance with the provisions of Sections 1608f to 1612 of the Code of Law for the District of Columbia, as amended February 23, 1905, as far as the same are applicable and that the assessment proceedings and assessment area for the establishment of the building lines herein provided for shall be the same as that provided in Section 1608j of said Code for the assessments in the openings, extension, widening and straightening of alleys or minor streets, in the same manner as if the establishment of building lines had been included in said Section.

5. Section 1608j of the aforesaid Code of Law for the District of Columbia, provides as follows: "that said jury shall assess as benefits accruing by reason of said opening, extension, widening, or straightening, an amount equal to the amount of damages as ascertained by them as hereinbefore provided, including five dollars per day for the Marshal and five dollars per day for each juror for the services of each when actually employed and all other expenses of such proceeding upon each lot, or part of lot or parcel of land in the square or block in which such alley or minor street is to be opened, extended, widened or straightened and upon each lot, part of lot, or parcel of ground in the squares or blocks confronting the square in which said alley or minor street is to be opened, extended, widened, or straight-

ened, which will be benefited by such opening, extension, widening or straightening, in the proportion that said jury may find said lots, parts of lots, or parcels of land will be benefited.

6. Sections 1609f to 1609i, inclusive of said Code of Law provide for the manner of giving notice of the proceeding, to the parties interested, for the empaneling of the jury by the Marshal, the swearing of the jury by the Court and the mode of procedure in the matter of the condemnation of land and the assessment of benefits necessary for the opening, widening, extending and straightening of
4 alleys and minor streets in the District of Columbia.

7. Petitioners say that Park Road from School street to 16th street, for the establishment of a building line upon which this proceeding has been instituted, is a street in the District of Columbia less than ninety feet wide; that there has been presented to them a plat of said street showing the lots and the names of the record owners thereof, accompanied by a petition of the owners of more than one half of the real estate shown on said plat requesting that building lines be established on said street, and petitioners deem that the public interests require that such building lines be established.

8. That duplicate plats prepared by the Surveyor of the District of Columbia are filed herewith marked "Exhibit D. C. No. 1" and Exhibit D. C. No. 2, showing the location of said proposed building line, the number of square feet to be taken from each lot or part of lot and the boundaries thereof in each square or block, and such other information as may be necessary for the purposes of such condemnation.

9. That the land to be taken for the establishment of the aforesaid building line is particularly described as follows:

Square W. 2675.

Part of Lot 520.

Beginning at a point at the N. W. corner of lot 520 and running southeasterly along south line of Park Road, 42.10 feet, thence perpendicular to Park Road southwesterly 20 feet, thence northwesterly and parallel to Park Road, 32.25 feet to 16th street, thence northerly with east line of 16th street 22.29 feet to Park Road.

Owner, Frank Teuber.

Area 743.50 square feet.

Square 2675.

Part of Lot 152.

5 Beginning at the northwest corner of lot 152 and running southeasterly with south line of Park Road, 62.25 feet, thence southwesterly perpendicular to Park Road 20 feet thence northwesterly parallel to Park Road 62.25 feet to Pine Street, thence northeasterly with east line of Pine street 20 feet to beginning.

Owner, Sabina M. Miller.

Area 1245 square feet.

Part of Lot 153.

Beginning at the northwest corner of lot 153 and running southeasterly with the south line of Park Road 62.25 feet, thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road 62.25 feet, thence northeasterly 20 feet to beginning.

Owner, Sabina M. Miller.

Area 1245 square feet.

Part of Lot 296.

Beginning at the northwest corner of lot 296 and running southeasterly with the south line of Park Road 68 feet, thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road 68 feet thence northeasterly 20 feet to beginning.

Owner, J. H. Gheen.

Area 1360 square feet.

Part of Lot 297.

Beginning at the northwest corner of lot 297 and running thence southeasterly with the south line of Park Road 17 feet, thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road 17 feet, thence northeasterly 20 feet to beginning.

Owner-, W. Clarence & J. Albert Duvall, trustees.

Area 340 square feet.

Square 2675.

Part of Lot 298.

Beginning at the northwest corner of lot 298 and running southeasterly with the south line of Park Road 17 feet, thence southwesterly perpendicular to Park Road, 20 feet, thence northwesterly parallel to Park Road 17 feet, thence northeasterly 20 feet to beginning.

Owner-, Lula B. & Lucy W. Dorch.

Area 340 square feet.

Part of Lot 299.

Beginning at the northwest corner of lot 299 and running southeasterly with the South line of Park Road, 17 feet, thence southwesterly perpendicular to Park Road 20 feet thence northwesterly parallel to Park Road 17 feet, thence northeasterly 20 feet to beginning.

Owner, Frances E. Meeks.

Area 340 square feet.

Part of Lot 300.

Beginning at the northwest corner of lot 300 and running southeasterly with the south line of Park Road 17 feet thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road 17 feet, thence northeasterly 20 feet to beginning.

Owner, Antonio Malnati heirs.

Area 340 square feet.

6

Part of Lot 310.

Beginning at the northwest corner of lot 301 and running southeasterly with the south line of Park Road 17 feet, thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road, 17 feet, thence northeasterly 20 feet to beginning.

Owner-, Austin E. and Emma V. Heiss.

Area 340 square feet.

Part of Lot 302.

Beginning at the northwest corner of lot 302 and running southeasterly with the south line of Park Road 17 feet, thence southwesterly perpendicular to Park Road 20 feet, thence northwesterly parallel to Park Road 17 feet, thence northeasterly 20 feet to beginning.

Owner, Ella V. Harrison.

Area 340 square feet.

Part of Lot 303.

Beginning at the northwest corner of lot 303 and running southeasterly with the south line of Park Road 0.50 feet, thence southerly with the west line of School street, 23.38 feet, thence northwesterly parallel to Park Road 12.61 feet, thence northeasterly 20 feet to beginning.

Owner, Donald S. Williamson.

Area 131.10 square feet.

The premises considered, your petitioners pray:

First. That public notice of not less than ten days be given of the filing of this petition, by advertisement in such manner as this Honorable Court shall prescribe, warning all persons having any interest in these proceedings to attend Court at a day to be named in said notice, and to continue in attendance until the Court shall have made its final order ratifying and confirming the awards of damages and the assessments of benefits of the jury; and that in addition a copy of said notice be served by the United States Marshal for the District of Columbia or his deputies upon such owners of the fee of the land to be condemned as may be found by the said Marshal, or his deputies, within the District of Columbia.

Second. That after the return of the Marshal and the filing of the proof of publication of said notice, the said Marshal be
 7 directed to summon a jury of five judicious disinterested men, not related to any one interested in these proceedings and not in the service or employment of the District of Columbia or of the United States to assess the damages each owner of land to be taken may sustain by reason of the establishment of the said building lines on Park Road as aforesaid, and the condemnation of the land necessary for the purpose thereof, and to assess the benefits resulting therefrom including the expenses of these proceedings as provided in the aforesaid Sections of the Code and Acts of Congress.

Third. That such other and further orders may be passed and proceedings had herein as are contemplated by the said provisions of said Code and the said Act of Congress, to the end that the hereinbefore described land may be condemned, and acquired for the purpose of the establishment of said building line on said Park Road as aforesaid.

And they will ever pray, etc.

HENRY B. F. MACFARLAND,
 HENRY L. WEST,
 JAY J. MORROW,

*Commissioners, D. C.,
 Petitioners.*

E. N. THOMAS,
 JAS. F. SMITH,

Attorneys for Petitioners.

DISTRICT OF COLUMBIA, ss:

8 Personally appears Henry B. F. MacFarland, who, being first duly sworn according to law, deposes and says: that he is the President of the Board of Commissioners of the District of Columbia; that he has read the foregoing petition of said Commissioners, and knows the contents thereof that the facts therein stated upon his personal knowledge are true and those stated upon information and belief he believes to be true.

HENRY B. F. MACFARLAND.

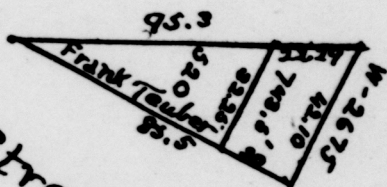
Subscribed and sworn to before me this 25th day of November,
 A. D. 1908.

[SEAL.]

WILLIAM TINDALL,
Notary Public, D. C.

(Here follows plat marked page 8.)

16th Street, Extd.



Pine Street

FILED
Nov. 25, 1908
Jefferson Block

Establishment of Building Restriction Line
S. P. Brown's Sub. Mount Pleasant

Park Road Building Line
Exhibit B.C. No. 1

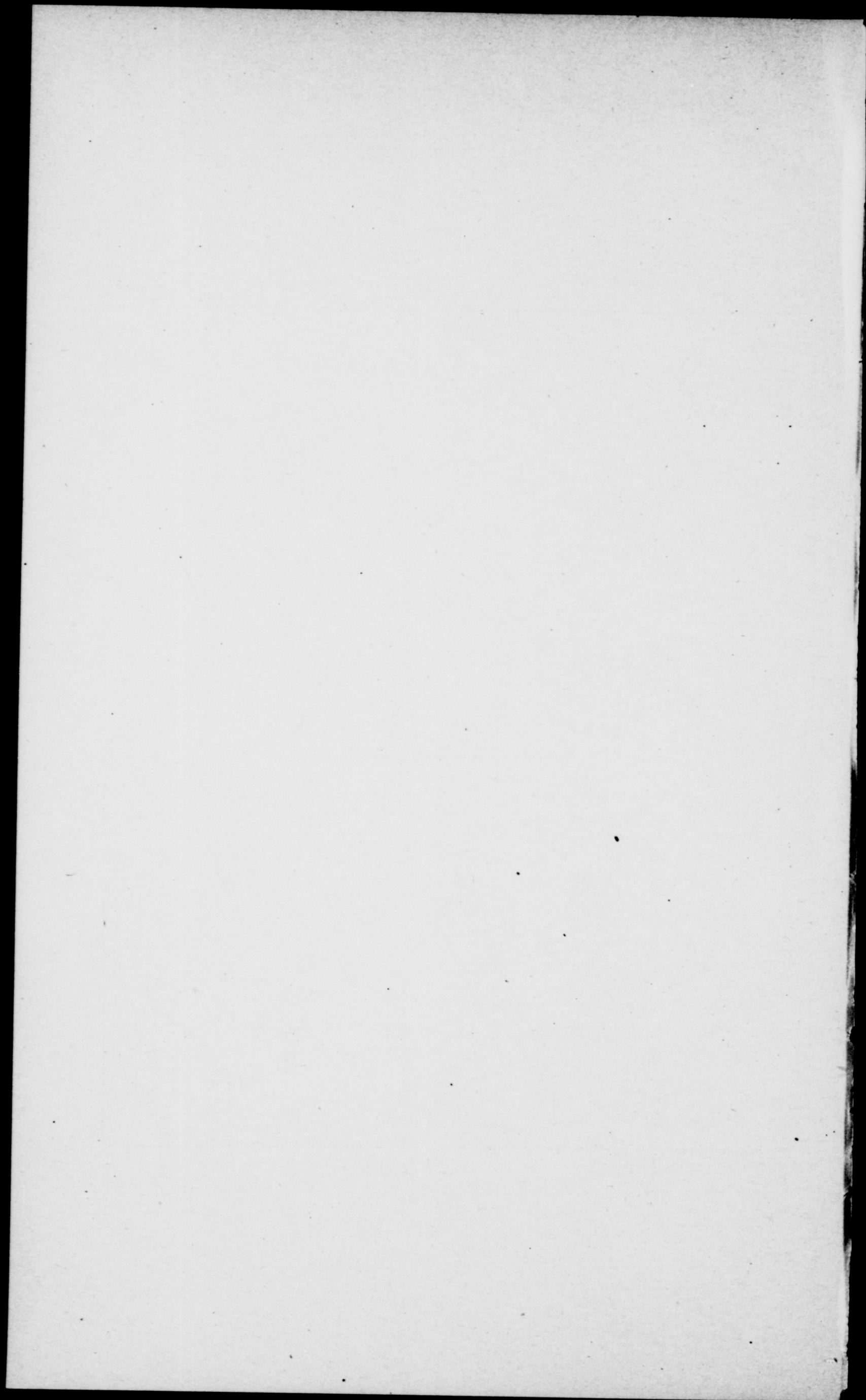
Park Road

Park

J. H. Green

10	W. Clarence	175
17	Tula Band	175
43	Frances E. Meeks	175
	Antonio Malnati	175
	Austin E. & Emma V.	175
	Ella V. Harrison	175
	Donald S. Williamson	175

School Street



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Notice & Order of Publication.

Filed Nov. 27, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A UNIFORM BUILDING LINE ON THE
SOUTH SIDE OF PARK ROAD FROM SCHOOL STREET TO SIXTEENTH
STREET NORTHWEST.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved June 21, 1906, entitled "An Act providing for the establishment of a uniform building line on streets in the District of Columbia, less than ninety feet wide, have filed a petition in this Court praying the condemnation of the land necessary for the establishment of a uniform building line on the south side of Park Road from School street to Sixteenth street, northwest, in the District of Columbia, as shown on a plat or map filed with the said petition, as part thereof, and praying also that a jury of five judicious, disinterested men not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia to assess the damages each owner of land to be taken may sustain by reason of the establishment of said uniform building line on the south side of Park Road, for which this proceeding has been instituted, and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages including the expenses of these proceedings upon the land in the square in which said building line is to be established in the square confronting said square as provided for in and by the aforesaid Act of Congress. It is, by the Court, this 27th day of November, A. D. 1908, ordered, that all persons having any interest in these proceedings be, and they are hereby warned and commanded to appear in this court on or before the 15th day of December A. D. 1908, at ten o'clock A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Times and the Washington Post, newspapers published in the said District commencing at least ten days before the said 15th day of December A. D. 1908. It is further ordered, that a copy of this notice and order be served by the United States Marshal or his deputies, upon such of the owners of the fee of the land to be

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condemned herein as may be found by the said Marshal or his deputies within the District of Columbia and upon the tenants and occupants of the same before the said 15th day of December A. D. 1908.

By the Court:

THOS. H. ANDERSON, *Justice*.

Marshal's Return.

Served copy of within notice and order on the following owners, tenants and occupants of the land to be condemned herein as follows:

Sabina M. Miller.
John W. Gheen.
W. Clarence Duvall.
Lula B. Dorch.
Frances E. Meeks.
Emma V. Heiss.
Austin E. Heiss.
Donald S. Williamson.
Lelia S. Lincoln and
Dr. G. W. Carter personally.

Dec. 10, 1908.

Frank Teuber and
J. H. Dorch personally.

Dec. 11, 1908.

Lena Malnati personally.

Dec. 12, 1908.

No other such owners, tenants and occupants of the land to — condemned herein to be found in the District of Columbia.

Dec. 14, 1908.

AULICK PALMER, *Marshal*.
H.

Memorandum.

It is admitted that order of publication was published in accordance with the terms of the order.

Verdict of Jury.

Filed Mar. 11, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A UNIFORM BUILDING LINE ON THE
SOUTH SIDE OF PARK ROAD FROM SCHOOL STREET TO 16TH
STREET, IN THE DISTRICT OF COLUMBIA.

We, the undersigned, the jury in the above entitled cause, hereby find the following verdict and award of damages for and in respect of the land to be condemned and taken for the establishment of a uniform building line on the south side of Park Road from School street to 16th street, in the District of Columbia, according to the plat or map filed with the petition in this cause, amounting to the sum of Seven thousand, eight hundred and twenty-one dollars and eighty-nine cents (\$7821.89) as set forth in Schedule No. 1, hereto annexed as part hereof.

13 And we, the jury aforesaid, hereby find the amount of benefits accruing by reason of the establishment of aforesaid building line, to be the sum of Eight thousand two hundred and twenty dollars (\$8220.00), said sum being equal to the aforesaid amount of damages awarded for and in respect of the land to be condemned for the establishment of the aforesaid uniform building line on the south side of Park Road from School street to 16th street, together with the costs and expenses of the condemnation proceedings herein.

And we, the jury aforesaid, find that the lots or parts of lots, pieces or parcels of land which will be benefited by the aforesaid establishment of said uniform building line are the lots or parts of lots, pieces or parcels of land, mentioned and described in Schedule No. 2, hereto annexed as part hereof; and we hereby find that the several lots or parts of lots, pieces or parcels of land mentioned in Schedule No. 2, will be benefited to the extent of the respective amounts mentioned and set forth in said Schedule No. 2, and we hereby assess against the said lots, or parts of lots, pieces or parcels of land, respectively, as and for benefits, as aforesaid, the several amounts specified, and set forth in said Schedule No. 2.

Witness our hands and seals this 11th day of March A. D. 1909.

W. H. RAPLEY.	[SEAL.]
COLIN H. LIVINGSTON.	[SEAL.]
PERCY S. FOSTER.	[SEAL.]
WM. P. LIPSCOMB.	[SEAL.]
RALPH L. GALT.	[SEAL.]

- 14 *Description of Land Taken to Establish a Building Line on Park Road from School Street to Sixteenth Street Extended Northwest.*

SCHEDULE #1—DAMAGES.

Square West of Square #2675.

Part of lot #800, beginning for the same at the northwest corner of said lot and running thence with the south line of Park Road in a southeasterly direction 42.10 feet; thence at right angles with said line in a southwesterly direction 20 feet; thence in a northwesterly direction and parallel to the south line of Park road 32.25 — to the east line of 16th street extended, thence with said line north no degrees and five ($0^{\circ} 5''$) minutes east 22.29 feet to the place of beginning, containing 743.5 square feet, owner Frank Teuber, amount awarded as damages..... \$1475.00

Square 2675.

Part of lot #152, beginning for the same at the northwest corner of said lot and running thence with the south line of Park Road in a southeasterly direction 62.25 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park road 62.25 feet; thence in a northeasterly direction 20 feet to the place of beginning, containing 1245 square feet, owner Sabina M. Miller, amount awarded as damages \$1540.00

Square 2675.

15 Part of lot #153, beginning for the same at the northwest corner of said lot and running thence with the south line of Park road in a southeasterly direction 62.25 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park road 62.25 feet; thence in a northeasterly direction 20 feet to the place of beginning, containing 1245 square feet, owner Sabina M. Miller, amount awarded as damages..... \$1245.00

Part of lot 296, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 68 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel with the said south line of Park road 68 feet; thence in a northeasterly direction 20 feet to the place of beginning, containing 1360 square feet, owner John H. Gheen, amount awarded as damages \$1360.00

Part of lot 297, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction

parallel to the said south line of Park Road 17 feet; thence in a north-easterly direction 20 feet to the place of beginning, containing 340 square feet, owners W. Clarence Duvall and J. Albert, Trustees, amount awarded as damages. \$340.00

16 Square 2675.

Part of lot 298, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park Road 17 feet and thence in a northeasterly direction 20 feet to the place of beginning, containing 340 square feet, owners Lula B. and Lucy W. Dortch, amount awarded as damages. \$340.00

Part of lot 299, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park road 17 feet; thence in a north-easterly direction 20 feet to the place of beginning containing 340 square feet, owner Frances E. Weeks, amount awarded as dam-ages \$340.00

Part of lot 300, beginning for the same at the northwest corner of said lot, and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction *direction* 20 feet; thence in a northwesterly direction parallel to the said south line of Park road 17 feet; thence in a northeasterly direction 20 feet to the place of beginning, contain- ing 340 square feet, owner Antonio Malnati, amount awarded as dam-ages \$340.00

17 Square 2675.

Part of lot #301, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park Road 17 feet and thence in a northeasterly direction 20 feet to the place of beginning; contain- ing 340 square feet, owners Austin E. and Emma V. Heiss, amount awarded as damages. \$340.00

Part of lot #302, beginning for the same at the northwest corner of said lot and running thence in a southeasterly direction with the south line of Park road 17 feet; thence at right angles to said line in a southwesterly direction 20 feet; thence in a northwesterly direction parallel to the said south line of Park Road 17 feet and thence in a northeasterly direction 20 feet to the place of Beginning, containing 340 square feet, owner Ella V. Harrison, amount awarded as dam-ages \$340.00

Part of lot #303, beginning for the same at the northeast corner of said lot and running thence in a northwesterly direction with the

south line of Park Road 0.50 of a foot thence at right angles with said line in a southwesterly direction 20 feet thence in a southwesterly direction parallel to the said south line of Park Road to the west line of School street; thence with said line in a northerly direction to the place of beginning, containing 131.10 square feet, owner Donald S. Williamson, amount awarded as damages..... \$161.89

SCHEDULE No. 2—BENEFITS.

Square 2675.

Part of lot #152, beginning for the same at the southwest corner of said lot and running thence with the east line of Pine street in a northeasterly direction 30 feet, thence in a southeasterly direction parallel with the south line of Park road 62.25 feet, thence at right angles to said line in a southwesterly direction 30 feet and thence in a northwesterly direction 62.25 — to the place of beginning, owner, Sabina M. Miller, amount assessed as benefits..... \$500.00

Part of lot #153, beginning for the same at the southwest corner of said lot, and running thence with the west line thereof in a northeasterly direction 30 feet; thence in a southeasterly direction parallel with the south line of Park road 62.25 feet; thence at right angles with said line in a southwesterly direction 30 feet; and thence in a northwesterly direction 62.25 feet to the place of beginning, owner Sabina M. Miller, amount assessed as benefits..... \$500.00

All of lot #154, owner Sabina M. Miller, amount assessed as benefits \$200.00

All of lot #155, owner Sabina M. Miller, amount assessed as benefits \$300.00

Part of lot #296, beginning for the same at a point on the west line of said lot, 20 feet from the south line of Park Road, and running thence in a southeasterly direction parallel with the said south line of Park road 68 feet; thence in a southwesterly direction with the east line of said lot 155 feet; thence in a northwesterly direction with the south line of said lot 68 feet, thence in a northeasterly direction with the west line of said lot 155 feet to the place of beginning, owner John H. Gheen, amount assessed as benefits \$1360.00

Part of lot #297, beginning for the same at a point on the west line of said lot 20 feet from the south line of Park road and running thence in a southeasterly direction parallel with the said south line of Park road 17 feet to the east line of said lot; thence with the said east line in a southwesterly direction 145 feet; thence at right angles to said line in a northwesterly direction 17 feet; and thence in a northeasterly direction with the west line of said lot 145 feet to the place of beginning. Owners W. Clarence Duvall and J. Albert, trustees, amount assessed as benefits..... \$440.00

Part of lot 299, beginning for the same at a point on the west line of said lot 20 feet from the south line of Park road and running thence in a southeasterly direction parallel with the said south line of Park road 17 feet; thence with the east line of said lot in a south-

westerly direction 95 feet; thence at right angles to said line in an
northwesterly direction $2\frac{1}{2}$ feet; thence in a southwesterly direction
parallel with the east line of said lot 45 feet; thence in a southwesterly
direction 7.07 feet to the south line of said lot; thence with said line
in a northwesterly direction 9.5 feet to the southwest corner of
20 said lot and thence with the east line of said lot in a north-
easterly direction 145 feet to the place of beginning. Owner
Frances E. Weeks, amount assessed as benefits. \$440.00

Part of lot #300, beginning for the same at a point on the west
line of said lot 20 feet from the south line of Park Road, and running
thence in a southeasterly direction parallel to said Park Road 17 feet
to the east line of said lot, thence with said east line in a southwesterly
direction 95 feet; thence at right angles to said line in a northwesterly
direction 17 feet and thence with the west line of said lot in a north-
easterly direction 95 feet to the place of beginning. Owner Antonia
Malnati, amount assessed as benefits. \$440.00

Part of lot #301, beginning for the same at a point on the west
line of said lot 20 feet from the south line of Park Road and running
thence in a southeasterly direction parallel to said Park Road 17 feet
to the east line of said lot; thence with said east line in a southwest-
erly direction 95 feet thence at right angles to said line in a north-
westerly direction 17 feet; thence with the west line of said lot in a
northeasterly direction 95 feet to the place of beginning, owner-
Austin E. and Emma V. Heiss, amount assessed as benefits \$440.00

Part of lot #302, beginning for the same at a point on the west
line of said lot 20 feet from the south line of Park Road and run-
ning thence in a southeasterly direction parallel to said Park
21 Road 17 feet to the east line of said lot; thence with said east
line in a southwesterly direction 95 feet; thence at right angles
to said line in a northwesterly direction 17 feet and thence with the
west line of said lot in a northeasterly direction 95 feet to the place of
beginning. Owner Ella V. Harrison, amount assessed as bene-
fits \$440.00

Part of lot #303, beginning for the same at a point on the west
line of said lot 20 feet from the south line of Park Road and run-
ning thence in a southwesterly direction with the said west line 95
feet; thence at right angles to said line in a southeasterly direction
70.15 feet to the west line of School Street; thence with said line in a
northerly direction to meet a line drawn parallel to the south line of
Park Road a distance of 20 feet therefrom; thence with said line in
a northwesterly direction parallel with Park Road to the place of be-
ginning. Owner Donald S. Williamson, amount assessed as bene-
fits \$215.00

Square 2676.

All of lot #544, owner James A. Watson, amount assessed as bene-
fits \$100.00

All of lot #669, owner Mary C. Watson, amount assessed as bene-
fits \$150.00

All of lot #667, owner Harry Lee Rust, amount assessed as bene-
fits \$150.00

	All of lot #666, owner Harry Lee Rust, amount assessed as benefits	\$150.00
	All of lot #665, owner Harry Lee Rust, amount assessed as benefits	\$150.00
22	All of lot #664, owner Harry Lee Rust, amount assessed as benefits	\$150.00
	All of lot #663, owner Harry Lee Rust, amount assessed as benefits	\$150.00
	All of lot #325, owner Charles W. King, amount assessed as benefits	\$75.00
	All of lot #324, owner Charles W. King, amount assessed as benefits	\$75.00
	All of lot #323, owner Charles W. King, amount assessed as benefits	\$75.00
	All of lot #322, owner Charles W. King, amount assessed as benefits	\$75.00
	All of lot #342, owner James M. Fisher, amount assessed as benefits	\$60.00
	All of lot #341, owner Clara R. Crook, amount assessed as benefits	\$60.00
	All of lot #340, owner Ina S. Leibhardt, amount assessed as benefits	\$60.00
	All of lot #801, owner Alban H. Nixson, amount assessed as benefits	\$75.00
	All of lot #189, owner Alban H. Nixson, amount assessed as benefits	\$75.00
	All of lot #188, owner Alban H. Nixson, amount assessed as benefits	\$50.00
	All of lot #187, owner Alban H. Nixson, amount assessed as benefits	\$50.00
	All of lot #186, owner Alban H. Nixson, amount assessed as benefits	\$40.00
23	All of lot #289, owner Harriet E. Emory, amount assessed as benefits	\$50.00
	All of lot #800, owner Anna T. Myers, amount assessed as benefits	\$10.00
	All of lot #424, owner Anna T. Myers, amount assessed as benefits	\$10.00
	All of lot #405, owner Anna T. Myers, amount assessed as benefits	\$10.00
	All of lot #386, owner Charles M. Campbell, amount assessed as benefits	\$10.00
	All of lot #385, owner Charles M. Campbell, amount assessed as benefits	\$25.00

Square 2674.

	All of lot #605, owner Albion B. Jameson, amount assessed as benefits	\$75.00
	All of lot #606, owner Albion B. Jameson, amount assessed as benefits	\$15.00

All of lot #607, owner Allison L. Adams, trustee, amount assessed as benefits	\$15.00
All of lot #608, owner Thomas R. Riley, amount assessed as benefits	\$15.00
All of lot #609, owner Thomas R. Riley, amount assessed as benefits	\$15.00
All of lot #610, owner Thomas R. Riley amount assessed as benefits	\$15.00
All of lot #611, owner Allison L. Adams, trustee, amount assessed as benefits	\$15.00
All of lot #801, owner Anna M. Cole, amount assessed as benefits	\$25.00
24 All of lot #802, owner Albion B. Jameson, amount assessed as benefits	\$25.00
All of lot #175, owner Harry K. Bliss, amount assessed as benefits	\$25.00
All of lot #176, owner Harry K. Bliss, amount assessed as benefits	\$25.00
All of lot #803, owner John P. Henriques, amount assessed as benefits	\$12.50
All of lot #804, owner Maria J. S. Davis, amount assessed as benefits	\$6.25
All of lot #805, owner Albert L. Sturtevant amount assessed as benefits	\$6.25
All of lot #525, owner Harry K. Bliss, amount assessed as benefits	\$10.00
All of lot #812, owner Cesare E. Casassa, amount assessed as benefits	\$3.00
All of lot #814, owner Charles E. and Mary E. Gross, amount assessed as benefits	\$7.00

Square 2608.

All of lot #810, owner William Henry Crowell, amount assessed as benefits	\$75.00
All of lot #644, owner Percy Cranford, amount assessed as benefits	\$40.00
All of lot #808, owner Margaret Cranford, amount assessed as benefits	\$50.00
All of lot #806, owner Edna Parmenter Berry, amount assessed as benefits	\$13.00
All of lot #807, owner Edna Parmenter Berry, amount assessed as benefits	\$27.00
25 All of lot #805, owner Mary F. Lewis, amount assessed as benefits	\$35.00
All of lot #804, owner Charles B. Campbell, amount assessed as benefits	\$5.00
All of lot #626, owner Avis E. Parmenter, amount assessed as benefits	\$5.00
All of lot #627, owner Charles P. Stone, amount assessed as benefits	\$5.00

All of lot #628, owner Della E. Mertz, amount assessed as benefits	\$5.50
All of lot #629, owner Della E. Mertz, amount assessed as benefits	\$5.50
All of lot #630, owner Byrde M. Wright, amount assessed as benefits	\$5.50
All of lot #631, owner Jesse B. Wilson, amount assessed as benefits	\$5.50
All of lot #632, owner Herbert L. Buell, amount assessed as benefits	\$5.50
All of lot #633, owner Minnie E. Hawke amount assessed as benefits	\$5.50
All of lot #634, owner Charles P. Stone, amount assessed as benefits	\$5.50

Square 2608.

All of lot #635, owners, Emma S. and Joseph T. Daly amount assessed as benefits	\$5.50
All of lot #636, owner Edith H. McKenzie, amount assessed as benefits	\$5.50
All of lot #637, owner- Charles F. and Della Winbigler, amount assessed as benefits	\$5.50

26 Square 2675.

Part of lot #298, beginning for the same at a point on the west line of said lot 20 feet from the south line of Park road and running thence in a southeasterly direction parallel with the said south line of Park road 17 feet to the east line of said lot; thence with said east line in a southwesterly direction 145 feet; thence at right angles to said line in a northwesterly direction 17 feet and thence in a northeasterly direction with the west line of said lot 145 feet to the place of beginning, owners Lula B. and Lucy W. Dortch, amount assessed as benefits

\$440.00

Exceptions to Verdict of Jury.

Filed Mar. 31, 1909.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING LINE ON THE SOUTH SIDE OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, D. C. .

Now comes Charles W. King, by his attorney, the owner of lots numbered 322, 323, 324, & 325—in square No. 2676, against which benefits were assessed by the verdict of the jury rendered in this cause,

and objects and excepts to the said verdict and to the assessment of
said benefits, and to the proceedings herein had for the fol-
27 lowing, among various, reasons, to wit:

1. That said verdict is unreasonable and unjust.
2. That said verdict is not uniform in its assessments of benefits.
3. That said verdict is based and not founded upon a true and proper basis of assessment of benefits.
4. That no petition of the owners of a majority of the real estate sought to be condemned accompanies the petition of the Commissioners filed herein.
5. That said assessment of benefits is not authorized by law, and is made in a manner contrary to the requirements of the law.
6. That the provisions of the law under which said proceedings are had so far as assessment of benefits are involved, are unconstitutional and void.
7. That this court is without jurisdiction in the premises.

Wherefore, and for divers other reasons, this exceptant objects and excepts to said verdict and to the proceedings herein, and prays the court that said verdict be set aside and held for naught.

CHARLES W. KING,
By JAS. E. PADGETT,
His Attorney.

28

Order Overruling Exceptions.

Filed Dec. 24, 1909.

In the Supreme Court of the District of Columbia, Holding a
District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING LINE ON THE SOUTH SIDE
OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, IN THE
DISTRICT OF COLUMBIA.

This cause coming on upon the exceptions and objections which have been filed to the verdict of the jury returned herein on the 11th day of March, A. D. 1909, and upon the motion to confirm the said verdict notwithstanding the objections and exceptions, and the Court being satisfied from the evidence that there has been presented to the Commissioners of the District of Columbia a plat showing the lots and the record owners thereof of the land necessary for the establishment of a uniform building line upon the south side of Park Road from School Street to 16th Street, for the establishment of which building line this proceeding was instituted, which plat was accompanied by a petition of the owners of more than one half of the real estate shown thereon requesting that said building line be established, and the Court being satisfied that the aforesaid verdict, awards and assessments are just and reasonable it is, by the Court, this 24th
29 day of December A. D. 1909, ordered, that the said objections be overruled and the said verdict, awards and assessments, be and the same are in all respects finally ratified and confirmed

and that the land mentioned and described in this proceeding as necessary for the establishment of the said building line be, and the same is hereby condemned for the aforesaid purpose.

By the Court:

THOS. H. ANDERSON, *Justice*.

Charles W. King appeals in open court to the Court of Appeals from the foregoing.

Memorandum.

Jan. 14, 1909.—Appeal bond approved and filed.

Waiver of Right to File Bill of Exceptions.

Filed Feb. 11, 1910.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING LINE ON THE SOUTH SIDE OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, D. C.

And now comes the appellant, Charles W. King, and withdraws his request for a bill of exceptions herein, for the reason
30 that not having any notice or knowledge of the proceedings taken before the jury, nor any prior proceedings thereto; not being present thereat nor represented by Counsel, he is unable to prepare a bill of exceptions. For these reasons the appellant relies solely upon the record, and the advantage to him accruing by reason of the defects apparent therein.

C. W. KING,
By JAS. E. PADGETT, *His Att'y*.

Feb'y 11/10.

Directions to Clerk for Preparation of Transcript of Record.

Filed Feb. 11, 1910.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 799.

In re THE ESTABLISHMENT OF A BUILDING LINE ON THE SOUTH SIDE OF PARK ROAD FROM SCHOOL STREET TO 16TH STREET, IN THE DISTRICT OF COLUMBIA.

The Clerk will please prepare the transcript of record in this matter for the Court of Appeals on appeal by the appellant, Charles W.

King, herein from the order of the Court ratifying and confirming the assessment of damages and benefits herein; such transcript to consist of the following papers:

31 First. Petition of Commissioners D. C. and plat accompanying same.

Second. Notice and order of publication. (Memorandum: It is submitted that order of publication was published in accordance with the terms of the order.)

Third. Verdict of jury.

Fourth. Exceptions of appellant, King, to verdict.

Fifth. Order overruling exceptions and confirming verdict—appeal in open Court—memorandum fixing bond at \$100—given and approved.

Sixth. Waiver of appellants of right to file bill of exceptions.

JAS. E. PADGETT,
Att'y for Appellant.

Feb'y 11, 1910.

32 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 31 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause entitled In re: The establishment of a Building — on the South side of Park Road from School Street to 16th Street, in the District of Columbia, District Court No. 799, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of February, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2129. Charles W. King, appellant, vs. Cuno H. Rudolph et al., &c. Court of Appeals, District of Columbia. Filed Feb. 28, 1910. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT.-5--1910

Henry W. Hodges
C. Link.

IN THE

Court of Appeals of the District of Columbia

APRIL TERM, 1910.

no 2129,

CHAS. W. KING, Appellant,

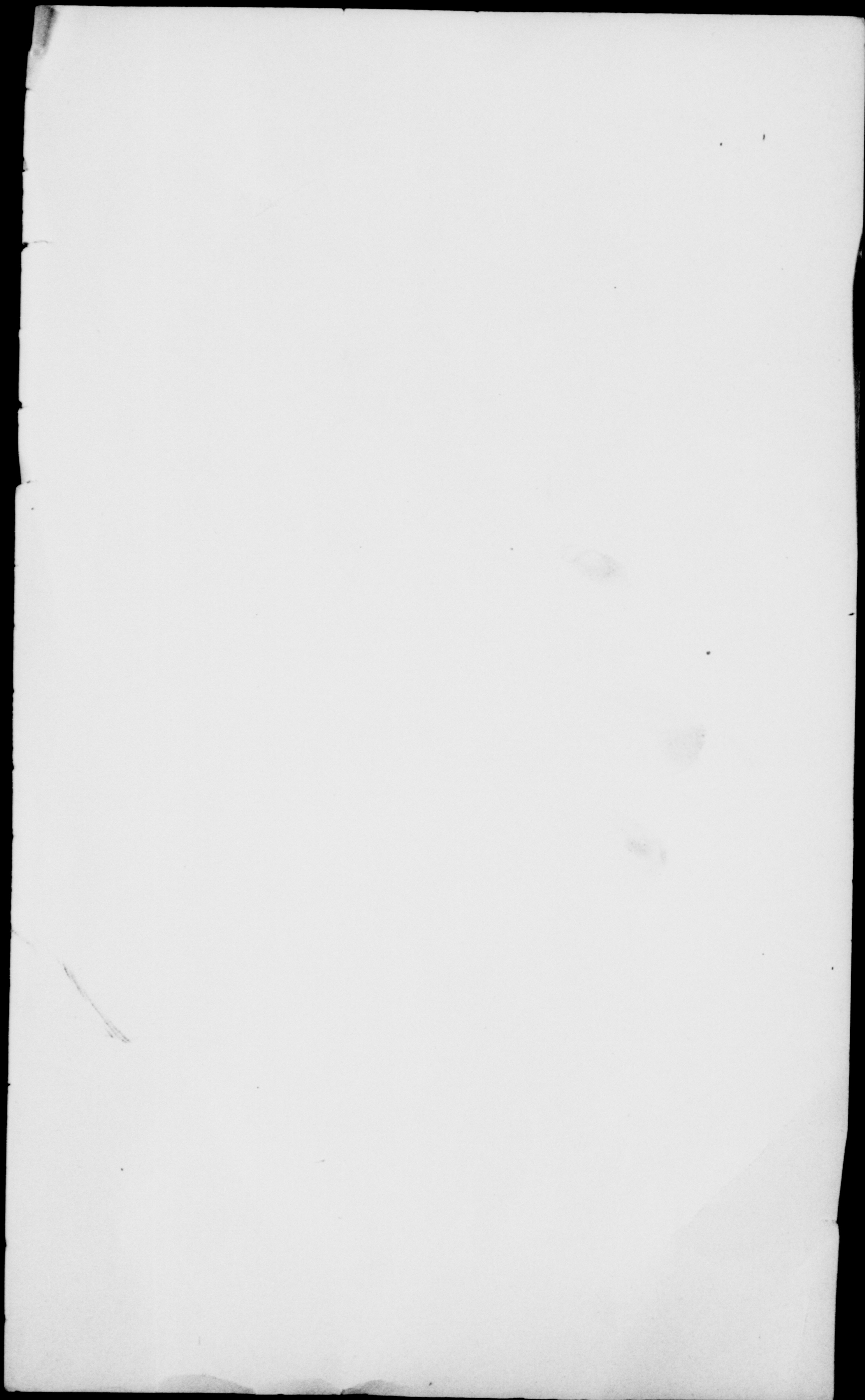
VS.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA, Appellees.

BRIEF IN BEHALF OF APPELLANT.

JAS. E. PADGETT,

Attorney for Appellant.



IN THE
Court of Appeals of the District of Columbia
APRIL TERM, 1910.

CHAS. W. KING, Appellant,

vs.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA, Appellees.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT OF CASE.

This is an appeal from the decree of the District Court confirming an award of a jury assessing benefits against the property of the appellant, in a proceeding for the establishment of a building line on Park Road, northwest.

The appellees filed their petition in the lower court for the establishment of said building line under the provisions of the Acts of Congress of June 21, 1906, which provides that such petition may be filed upon the presentation to said commissioners of a plat showing the street upon which the line is proposed to be established, and showing the lots and record owners thereof, accompanied by a petition of the owners of one-half of the real estate shown on said plat requesting that building lines be established. The act further provides, that the petition of the commissioners shall describe the land to be taken, and shall be accompanied by duplicate plats, showing the location of the proposed building lines, the number of square feet to be taken from each lot or block, and the boundaries thereof in each lot or block, and such further information as may be necessary for the purpose of said condemnation.

The act further provides that the condemnation proceedings shall be in accordance with the provisions of Sections 1608f to 1612 of the District Code, as far as the same are applicable; and that the assessment proceedings and assessment area shall be the same as those provided by Section 1608j of said Code for the assessment in the opening, &c., of alleys and minor streets.

Upon the filing of said petition, November 25, 1908, the court, on November 27, 1908, passed a "notice and order of publication," commanding persons interested to appear in court on December 15, 1908, and continue in attendance until the court shall have made its final order ratifying the award to be made by the jury. (Rec. 7). This notice and order was duly published.

The owners of the property to be condemned were served personally with a copy of said notice and order. (Rec. 8). The owners of property in squares not to be condemned, but against which benefits were to be assessed, were not personally served.

After a hearing of the matter the jury, which had been selected and sworn, rendered its verdict and award of damages and benefits—the damages amounting to \$7,821.89, and the benefits, that amount plus the amount of costs and jury fees, equally \$8,220.00. By said award this appellant's property, which is not in the square with the property condemned, was assessed \$300 for benefits; and the properties of other persons in three squares outside of that in which the condemned property lies, were assessed for benefits.

In due time the appellant filed exceptions against the verdict and assessment of benefits, and prayed that the same be set aside and held for naught. (Rec. 17).

Upon hearing on the exceptions, the court, by its decree, overruled the same, and finally ratified and confirmed the award and assessments. (Rec. 17). The appellant appealed from said decree in open court.

The appellant then requested a bill of exceptions, but, subsequently realizing that he had not had any notice or

knowledge of the proceedings until after the verdict and award of the jury had been filed; and that he had not been present or represented at the hearing, he withdrew his request, and elected to rely solely upon the defects appearing upon the face of the record.

ASSIGNMENTS OF ERROR.

The court erred in ratifying said award and assessment of benefits, because:

1. The appellant had no legal notice of said proceedings, and the jury was without jurisdiction to assess benefits against appellant's property, and the court was without jurisdiction to ratify said assessment, so far as the appellant and the other owners of property in squares other than that in which the condemned property lies are concerned.

2. The acts of Congress under which these proceedings were instituted, so far as said assessment for benefits and the manner in which they were assessed by the jury are concerned, are unconstitutional and void.

3. That said assessment for benefits as made by the jury in this case is not authorized by law, and it was made in a manner contrary to the requirements of the law.

ARGUMENT.

I.

That appellant had no legal notice of the proceedings, and that the acts of the jury and of the court were without jurisdiction.

Section 1608f of the code provides two methods by which persons interested or supposed to be interested in the proceedings shall be notified—summoned. If the person is the owner of the property to be condemned, personal service of the order of publication must be made upon him by the marshal; if the person is the owner of property in any of

the confronting squares, against which benefits are to be assessed, then notice by advertisement is sufficient.

Section 1608j provides that the jury shall assess as benefits, accruing by reason of the establishment of the building line, against the lot in the square in which such line is established, and against the lots in the squares confronting the square in which such line is established, the amount of damages, &c.

In the case at bar the square in which the building line was established has four confronting squares, and jury assessed benefits upon lots in three of these confronting squares, in one of which is situated the appellant's property.

Now, did the notice and order of publication as advertised, notify the appellant that any assessment of benefits would be made upon his property, or that he was interested in the proceedings? If not, then the jury was without jurisdiction to assess upon his property, or in any manner affect him by its acts; and so was the court without jurisdiction, because the appellant was never legally before the court. And the same statement ^{applies} ~~appears~~ to other owners of property in the confronting squares.

The order of publication as advertised recites:

Notice is hereby given that the Commissioners
 * * * have filed a petition in this court praying the
 condemnation of land necessary for the establishment
 of a uniform building line on the south side of Park
 Road from School to Sixteenth street, northwest.
 * * * also praying that a jury * * * be sum-
 moned * * * to assess the damages each owner of
 land to be taken may sustain by reason of the estab-
 lishment of said uniform building line * * * and
 to assess as benefits resulting therefrom the entire
 amount of said damages * * * upon the land in
 the square in which said building line is to be estab-
 lished in the square confronting said square. * * *
 It is by the court ordered that any persons having any
 interest in these proceedings be and they are hereby
 named and commanded to appear, &c. (Rec. 7).

Now from this notice who has any interest in the proceedings? The notice says that the benefits are to be assessed upon the land in the square in which the building is to be established, and in the land in the "square," not squares, confronting said square. Clearly then, only the persons owning land in these two squares. The notice calls upon these persons only to appear, and affirms that they are the only persons interested. But who are the persons in the confronting "square?" There are four confronting squares—which one is included in the notice? Not all four. One may be included in four, but not four in one. This notice confines the persons interest to one confronting square—the assessments for benefits is to be made on one confronting square. Can the court say that the notice designates the square in which appellant's property lies? That he is the person interested? This notice is too indefinite and uncertain to give jurisdiction. The object raised is not merely technical, without merit, because it goes to the very jurisdiction of the court in the proceeding.

"Every requirement of a statute conferring jurisdiction upon the court to entertain a proceeding, providing a legal method of taking private property, must be complied with to the letter. It must clearly appear either by express admission of the parties, or by competent evidence, that all the jurisdictional requirements are present before the court can legally proceed."—Fay vs. Macfarland, 32 App. D. C. 299. 15 Cyc. 812.

"The right of service of process by publication being of purely statutory creation and in derogation of the common law, the statute authorizing such service must be strictly pursued in order to confer jurisdiction upon the court."

17 Encly. Pldg. & Pr. 45.

7 Encly. Pldg. & Pr. 494.

The notice must be of such a character as to inform the owner that it is his land which is about to be taken for public use, and if he is not so informed the proceeding is

void. "And here we desire to lay emphasis on this intention of the statute that the notice itself shall convey to the land owner the information and the warning to which he is entitled. A statute which proposes to operate in invitum does not tend to charge him with any duty to aid such a proceeding by going about to inquire whether it is his land the authorities were talking about, in other words with a duty to give himself notice."

Quackenbush vs. D. C., 20 D. C. 300.

II AND III.

That the Acts of Congress under which these proceedings were instituted, as applied to the verdict and award of the jury in this case, are unconstitutional and void; and the assessment of benefits by the jury are not authorized by but was made in a manner contrary to law.

The Acts of Congress in question are of a general prospective nature, and do not deal with any special lots or squares of ground which would require the hypothesis of a legislative determination as to the amount of benefit conferred.

The question of the constitutionality of these acts, or rather of acts which they displaced, arose in the case of *Brandenburg vs. D. C.* (26 App. D. C. 140), wherein the court held that the acts to be constitutional in view of the decision of the Supreme Court in *Wright vs. Davidson* (181 U. S. 371), and declared the assessment for benefits involved to be valid. On appeal to the Supreme Court of the U. S. (205 U. S. 135) the judgment of the Court of Appeals was reversed and the assessments declared to be invalid and ordered to be quashed. And the court in order to avoid deciding that the acts were unconstitutional, gave them an interpretation and meaning which removed from them that very thing which was alleged as the reason for their unconstitutionality, namely, the necessity for the jury to assess as benefits upon the lands involved a sum not less than the

amount of the damages awarded for the land condemned and costs. In other words, that the jury was not bound by the literal words of the acts to assess as benefits the full amount of the damages and costs, but should assess the actual benefits only. And because the jury evidently did not confine itself to the actual benefits, but followed the language of the acts in its award, the court held such award in violation of law and quashed the assessments. Now the logical conclusion from this decision is, that if the Acts really meant that the jury should assess as benefits not less than the full amount of the damages and costs then the acts would be unconstitutional. The court said: "But the words quoted permit if they do not require, the interpretation that in any event the apportionment is to be limited to the benefit, and if so limited all serious doubt as to the validity of the statute disappears."

And by this last decision of the court Justice Harlan, who delivered the opinion of the court in the Norwood vs. Baker case, and the able dissenting opinion in the Wright vs. Davidson case, and the justices who united with him in these opinions, had their contention—that only actual benefits could be assessed—declared in the decision delivered by the new Justice.

And the court, in the case quoted from, in dealing with the assessment made by the jury said: "We think it apparent, as was assumed by the Court of Appeals, that the jury understood their duty to be to divide the whole cost among the land owners, whether the benefit was equal to their share of the cost or not. It must be admitted that the language of the statute more or less lent itself to that understanding. There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots. For this reason the assessment must be quashed."

And we submit that the same reasons obtain in the case at bar for the quashing of the assessments. The idea that the **whole** amount of damages and costs should be assessed as

see. of Cuth. Park

51 Baker 275

in Cuthbert Domain - 3d ed. - Ric 570

benefits upon the property subject to be assessed runs through all the proceedings.

Section 1608j of the Code, under which the assessments were made, provides: "That said jury shall assess as benefits * * * an amount equal to the amount of damages * * * including five dollars per day for marshal and five dollars per day for each juror * * * and all other expenses of such proceeding," upon the lots involved.

The Commissioners, in their petition set for this section of the Code as a basis for assessment of benefits, and then pray that a jury may be summoned "to assess the benefits resulting therefrom including the expenses of these proceedings as provided in the aforesaid sections of the Code and Acts of Congress." (Rec. 2, 6).

The "notice and order of publication" recites: "Notice is hereby given that the Commissioners of the District of Columbia * * * have filed a petition * * * praying * * * that a jury * * * be summoned * * * to assess as benefits resulting therefrom the **entire amount** of said damages including the expenses of these proceedings upon the land in the square in which said building line is to be established in the square confronting said square as provided for in the aforesaid Act of Congress.

The jury was sworn; and section 1608g provides: "to which jurors said court shall administer an oath or affirmation * * * that they will * * * assess the damages each owner of land may sustain * * * **and assess the benefits resulting herefrom as hereinafter provided.**" This is provided in Sec. 1608j, already quoted.

The jury rendered its verdict and found the amount of damages to be \$7,821.89. ~~Its~~ finding of benefits was as follows:

"And we, the jury aforesaid, hereby find the amount of benefit accruing by reason of the establishment of aforesaid building line, to be the sum of eight thousand, two hundred and twenty dollars (\$8,220.00), said **sum being equal** to the aforesaid amount of damages awarded for and in respect of

the land to be condemned for the establishment of the aforesaid uniform building line on the south side of Park Road from School to 16th street, together with the costs and expenses of the condemnation proceedings herein."

And to make up such sum the jury assessed the damages on five squares, and on the lots of some of the owners as low as \$3.00. They clearly acted on the impression that they should assess the benefits in a sum equal to the damages and costs. In other words, followed the language of the statute, of the Commissioner's petition, of the notice of publication, and of their oath. And we submit in the language of the court in the Brandenburg case, "That the jury understood their duty to be to divide the whole costs among the land owners, whether the benefit was equal to their share of the cost or not."

JAS. E. PADGETT,

Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT. 6--1910

Henry W. Hodges
Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2129.

CHARLES W. KING, APPELLANT,

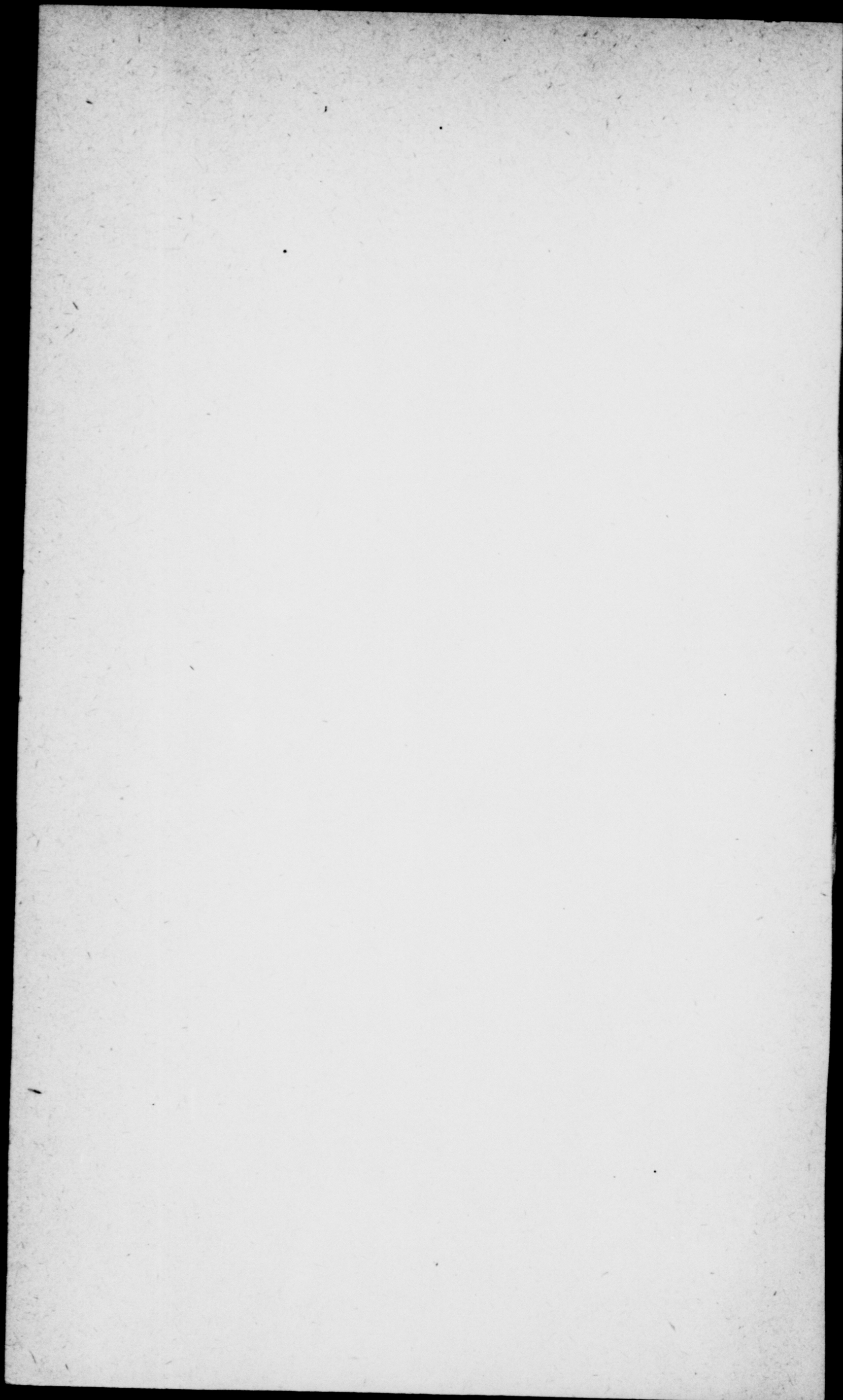
vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND WIL-
LIAM V. JUDSON, COMMISSIONERS OF THE DISTRICT OF
COLUMBIA, APPELLEES.

BRIEF FOR APPELLEES.

EDWARD H. THOMAS,
JAS. FRANCIS SMITH,
Attorneys for Appellees.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.



Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2129.

CHARLES W. KING, APPELLANT,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND WILLIAM V. JUDSON, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLEES.

BRIEF FOR APPELLEES.

Statement of the Case.

An act of Congress passed June 21, 1906, entitled "An act providing for the establishment of a uniform building line on streets in the District of Columbia less than ninety feet wide" (34 Stats., 384), authorized the Commissioners of the District of Columbia to establish building lines on such streets, upon the presentation to them of a plat of the street or part of street upon which such action was desired, showing the lots and the names of the record owners thereof, and accompanied by a petition of the owners of more than one-half of the real estate shown on said plat requesting that

building lines be established, or when the Commissioners deemed that the public interests required that such building lines be established. The said act of Congress further provided that the proceedings should be had in accordance with the provisions of the code of law for the District of Columbia relating to the opening of alleys and minor streets (sections 1608-1608j of the Code), and that assessments for benefits should be returned as provided in section 1608j of said code.

Pursuant to this authority the Commissioners of the District of Columbia on November 25, 1908, filed a petition for the establishment of a uniform building line on the south side of Park road from School street to 16th street, which petition alleged that Park road from School street to 16th street, for the establishment of a building line upon which a petition had been filed, is a street in the District of Columbia less than ninety feet wide; that there had been presented to them a plat of said street showing the lots and the names of the record owners thereof, accompanied by the petition of the owners of more than one-half of the real estate shown on said plat requesting that building lines be established on said street, and alleging further that the petitioners deem that the public interest required that such building lines be established (R., 3).

Following the filing of this petition proceedings were duly prosecuted without objection, which resulted in a verdict of the jury returned March 11, 1909, in which awards aggregating seven thousand eight hundred twenty-one dollars and eighty-nine cents, and assessments aggregating eight thousand two hundred twenty dollars, said assessments being equal to the amount of the awards plus the cost of the proceedings, were returned by the jury. Of these assessments \$300.00 was assessed against land owned by the appellant. On March 31, 1909, the appellant herein, then appearing for the first time in the proceedings, filed objections to the confirmation of the verdict upon the following grounds: First,

that the verdict was unreasonable and unjust; second, that said verdict is not uniform in its assessment of benefits; third, that said verdict is based and not founded upon the true and proper basis of assessment of benefits; fourth, that no petition of the owners of a majority of the real estate sought to be condemned accompanies the petition of the Commissioners filed herein; fifth that said assessment of benefits is not authorized by law, and is made in a manner contrary to the requirements of law; sixth, that the provisions of the law under which said proceedings are had, so far as assessment of benefits are involved, are unconstitutional and void; seventh, that this court is without jurisdiction in the premises (R., 17).

The court below after argument passed an order as follows:

"This cause coming on upon the exceptions and objections which have been filed to the verdict of the jury returned herein on the 11th day of March, A. D. 1909, and upon the motion to confirm the said verdict notwithstanding the objections and exceptions, and the court being satisfied from the evidence that there has been presented to the Commissioners of the District of Columbia a plat showing the lots and the record owners thereof of the land necessary for the establishment of a uniform building line upon the south side of Park road from School street to 16th street, for the establishment of which building line this proceeding was instituted, which plat was accompanied by a petition of the owners of more than one-half of the real estate shown thereon requesting that said building line be established, and the court being satisfied that the aforesaid verdict, awards and assessments are just and reasonable it is, by the court, ~~this 24th day of December, A. D. 1909, ordered, that~~ the said objections be overruled and the said verdict, awards and assessments, be and the same are in all respects finally ratified and confirmed and that the land mentioned and described in this proceeding as necessary for the establishment of the said building

line be, and the same is hereby condemned for the aforesaid purpose.

"By the Court:

"THOS. H. ANDERSON, *Justice.*"

From this order the appellant, Charles W. King, prosecuted an appeal to this court.

ARGUMENT.

No showing whatever appears in the record in support of the several grounds set up by this appellant for his motion to set aside the verdict. In the oral argument, addressed to the court below in support of his objections, two propositions only were urged; first, that the assessments were unreasonable and unjust, and, second, that no petition of the owners of a majority of the real estate sought to be condemned accompanied the petition of the Commissioners.

On the first proposition, in the absence of any specific allegation of injustice, the court below could not have well done otherwise than overrule the motion. In the recent case of *Columbia Heights Realty Company vs. Macfarland*, 217 U. S., 547, the Supreme Court of the United States, Mr. Justice Lurton, addressing itself to a similar proposition, said:

"The power of the court to review the award by such a jury must in the very nature of the matter be limited to plain errors of law, misconduct or grave error of fact indicating plain partiality or corruption. No specific wrong, injustice or error is pointed out. * * * Even if we had all of the evidence before us, it would not be within our province to weigh it. But we have not, nor is there any agreed statement of facts. It is impossible for us to say, therefore, whether the trial court erred in holding

the award not unreasonable, or so unjust as to require a new trial before another jury."

See also—

Thompson *vs.* Macfarland, 33 App., 322.

On the second proposition the appellant apparently relied on the case of Fay *vs.* Macfarland, 32 App., p. 295. In that case, at the outset of the proceedings, the appellant moved to quash the petition of the Commissioners and traversed the allegation therein that a petition of the owners of more than one-half of the real estate in said block for the extension of the aforesaid alley has been presented to the Commissioners of the District of Columbia and further traversed the allegation of the petition that the Commissioners deemed that the public interests required the opening of the alley which was the subject of that suit. This court consequently held that the allegations traversed were put in issue and that it was incumbent upon the petitioners to establish these facts by evidence in order to give the court jurisdiction to proceed, the court saying:

"On hearing the Commissioners offered no evidence in support of the above allegations of the petition. On this point the record discloses that 'No evidence was introduced by the petitioners of the mode or manner in which they deemed the public interests required the extension of said alley, nor any record of any proceeding by them showing any action by the petitioners on the subject, other than the filing of the petition herein, and no original or copy of any petition by the owners of more than one-half of the real estate in said block for the extension of said alley was produced or offered in evidence.' This defect in the pleadings was called specifically to the attention of the court by the appellants in the objections filed before the decree of confirmation was entered."

In the present case no such issue was raised and the allegation of the original petition with respect to the filing of a plat and petition and was not put in issue. Nevertheless the petitioners at the hearing of the case put in evidence the petition which had been filed with them showing the land needed for the establishment of the building line, accompanied by a plat, signed by the owners of more than one-half of the land shown thereon. The recital by the court in the final order below that it was satisfied by the evidence that the petition and plat required by law had been presented to the Commissioners is conclusive, it is submitted, of this subject. The appellant has not brought up the evidence by a bill of exceptions, the appropriate method for so doing, and this court is therefore unable, even if it were disposed, to review the weight and competency of the evidence which from the record "satisfied" the court below as to its jurisdiction in the premises.

The question of the constitutionality of the law was not argued below. A reference to the leading cases in this jurisdiction on this question is all that is necessary in this court.

Bauman vs. Ross, 167 U. S., 548-590.

Martin vs. D. C., 205 U. S., 135.

The construction given to the alley law in the case last cited has since that decision been applied in the Supreme Court of the District of Columbia to section 1608j of the Code.

The brief filed in behalf of the appellant, received after the above was printed, discusses two questions only, neither of which was argued in the court below. First, the sufficiency of the notice; second, the constitutionality of the law.

The question of the sufficiency of the notice was not even assigned below in support of the motion to set aside the verdict and might well be ignored here. A short discussion will suffice.

The law, section 1608f of the Code, provides:

"That the said court shall cause public notice of not less than ten days to be given of the filing of said proceedings, by advertisement in such manner as the court shall prescribe, which notice shall warn all persons having any interest in the proceedings to attend court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessment of benefits of the jury; and, in addition to such public notice, said court, whenever in its judgment it is practicable to do so, shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the fee of the land to be condemned as may be found by said marshal or his deputies within the District of Columbia."

The published notice in this proceeding (R., 7) fully satisfied all of the requirements of this statute. The appellant complains that the words "confronting square" used in the notice instead of "confronting squares" did not put him on notice. As the land of the appellant assessed in this proceeding is directly on the opposite side of the street from that on which the building line was to be established, the merit of this contention is indiscernible.

And see

In re City of Amsterdam, 126 N. Y., 158.

City of Ottawa vs. Macey, 20 Ill., 413.

State vs. District Court of Hennepin County, 23 Minn., 235.

Hennessy vs. Douglas County, 99 Wis., 129.

Constitutionality of the Law.

The appellant cites in this connection the case of *Martin-Brandenberg vs. D. C.*, 205 U. S., 135. That case concerns the constitutionality of the former provisions of the Code for the opening, etc., of alleys which were superseded by sections 1608-1608l. The provisions respecting the assessments did not differ materially from those of section 1608j now in force, but the proceedings in that case were not court proceedings, being had before a marshal's jury without the intervention or supervision of the court. In that case the Supreme Court of the United States, without passing on the question of the constitutionality of an arbitrary provision in a general law requiring the assessment of the whole or a fixed proportion of the awards as benefits, construed that law as not constituting such an arbitrary requirement, but as allowing the jury to assess benefits in their discretion up to the full amount of the award, and the court found from the record in that case that the assessments complained of could not possibly represent actual benefits and they therefore concluded that the jury had misconstrued the law.

Since the *Brandenberg* decision the Supreme Court of the District of Columbia has uniformly applied the construction adopted by the Supreme Court of the United States in that case to section 1608j of the Code, the section in controversy here. Moreover, in the present case the jury in their verdict (R., 9) found

“that the lots or parts of lots, pieces or parcels of land which will be benefited by the aforesaid establishment of said uniform building line are the lots or parts of lots, pieces or parcels of land, mentioned and described in Schedule No. 2, hereto annexed as part hereof; and we hereby find that the several lots or parts of lots, pieces or parcels of land mentioned in Schedule No. 2, will be benefited to the extent of the

respective amounts mentioned and set forth in said Schedule No. 2, and we hereby assess against the said lots, or parts of lots, pieces or parcels of land, respectively, as and for benefits, as aforesaid, the several amounts specified, and set forth in said Schedule No. 2."

No such declaration of the jury appeared in the Brandenburg case. There is nothing in the record herein to negative the positive declaration of the jury just quoted. No showing is made by the appellant that the assessments returned by the jury against his properties represent anything other than direct and actual benefits resulting from the establishment of the building line for which this proceeding was instituted. The verdict on its face verifies the declaration of the jury. Properties of this appellant were assessed consistently with the properties of other parties similarly situated. This appellant alone of all of the parties interested, assessed in the aggregate eight thousand two hundred and twenty dollars (\$8,220.00), has taken exceptions to the verdict.

It is submitted, therefore, that the judgment of the Court below should be affirmed.

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